

Supreme Court of the United States

October Term, 1965

No. 100

PETER KLOPPER,

Petitioner,

STATE OF NORTH CAROLINA,

Respondent.

ANSWER TO PETITION

FOR

WRIT OF CERTIORARI

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In The
Supreme Court of the United States

October Term, 1965

No. 1216

PETER KLOPFER,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

ANSWER TO PETITION
FOR
WRIT OF CERTIORARI

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina, printed in Petitioner's Appendix A, pp. 12-14, is reported in 266 N. C. 349, 145 S. E. 2d 909 (1966).

JURISDICTION

The jurisdiction of this Court is invoked by Petitioner under 28 U. S. Code, Section 1257 (3).

QUESTION PRESENTED

In State criminal prosecutions, is an accused's right to a speedy trial circumvented when a state is allowed to take a *nol. pros.* with leave over defendant's objections.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are:

(1) Sixth Amendment to the United States Constitution
 "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(2) Fourteenth Amendment to the United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On February 24, 1964, a true bill of indictment was returned by the Grand Jury for the County of Orange, State of North Carolina, charging the defendant Peter Klopfer with the criminal offense of Trespass in violation of N. C. G. S. 14-134.

At the March, 1964, Special Criminal Session of the Superior Court of Orange County, State of North Carolina, the defendant was placed on trial to answer the charge as laid in the bill of indictment. The defendant entered a plea of

Not Guilty, and thereafter a mistrial was declared because the jury was unable to decide upon a verdict.

Subsequently, at the August, 1965, Criminal Session of the Superior Court of Orange County, the honorable Judge presiding granted the Solicitor's motion to take a *nol. pros.* with leave as to the trespass charge pending against the defendant.

The defendant objected and appealed to the North Carolina Supreme Court, that Court upholding the Solicitor's right to enter such motion as reported in 266 N. C. 349, 145 S. E. 2d 909 (1966).

AN ACCUSED'S RIGHT TO A SPEEDY TRIAL IS NOT CIRCUMVENTED WHEN A STATE IS ALLOWED TO TAKE A NOL. PROS. WITH LEAVE OVER DEFENDANT'S OBJECTION, AND THEREFORE, THIS COURT SHOULD REFUSE PETITIONER'S PETITION FOR WRIT OF CERTIORARI.

Petitioner, in essence, is contending that his having been subjected to criminal prosecution on the charge of Trespass; the refusal of the State to proceed with the prosecution, as evidenced by the entry of a *nol. pros.* with leave, effectively deprived him of the opportunity to exonerate himself and impaired his ability to sustain any defense he might present in Court, thereby violating his constitutional right to a speedy and impartial trial.

The Supreme Court of North Carolina has, since its inception, recognized the right of the Solicitor, with the permission of the Court, to enter a *nol. pros.* In *STATE v. FURMAGE*, 250 N. C. 616, 109 S. E. 2d 563 (1959), the Supreme Court of North Carolina said, 109 S. E. 2d pp. 567, 568:

"A solicitor, as a public officer and as an officer of the court, is vested with important discretionary powers. True, it is his responsibility, upon a fair and impartial trial, to bring forward all available evidence and to

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prosecute persons charged with crime. Even so, prior to prosecution, if he finds the available evidence insufficient to support a conviction, he may enter a *nolle prosequi* or *nolle prosequi* with leave. G. S. 15-175; WILKINSON v. WILKINSON, 159 N. C. 265, 74 S. E. 740. In S. v. MOODY, 69 N. C. 529, Reade, J., said: 'It was discussed at the bar whether it is within the power of a solicitor to discharge a defendant or to enter a *nol. pros.*, etc., or whether that is the province of the court. The rule is that it is usually and properly left to the discretion of the solicitor.' Also, see S. v. THOMPSON, 10 N. C. 613; S. v. BUCHANAN, 23 N. C. 59; S. v. CONLY, 130 N. C. 683, 41 S. E. 534; 27 C.J.S., District & Pros. Attys. Sec. 14 (1)."

The distinction between a *nol. pros.* and *nol. pros.* with leave was made in WILKINSON v. WILKINSON, 159 N. C. 265, 74 S. E. 740 (1912), at 74 S. E. p. 741:

"A *nol. pros.*, in criminal proceedings, is nothing but a declaration on the part of the solicitor that he will not, at that time, prosecute the suit further. Its effect is to put the defendant without day, that is, he is discharged and permitted to go whithersoever he will, without entering into a recognizance to appear at any other time. It is not an acquittal, it is true, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment, and he be tried upon it. To prevent abuse, the power of the solicitor to issue new process upon the same bill is checked and restrained by the fact that a *capias*, after a *nol. pros.* does not issue, as a matter of course, upon the mere will and pleasure of the officer, but only upon permission of the court, which will always see that its process is not abused to the oppression of the citizen." See also, STATE v. SMITH, 129 N. C. 546.

North Carolina has long recognized that when a *nol. pros.* is entered by the Solicitor, this, in effect, terminates the mat-

ter for all practical purposes on the indictment since the defendant becomes amenable to another indictment on the same charge in any court of concurrent jurisdiction. *STATE v. McNEIL*, 10 N. C. 183 (1820). In so treating the effect of a *nol. pros.*, North Carolina is in the majority of jurisdictions. 21 Am. Jur. 2d, *Criminal Law*, Section 519; Anno., New Prosecution in Another Court, 177 A.L.R. 423.

Therefore, it would appear that a *nol. pros.* or *nol. pros.* with leave, does, for all practical purposes, terminate the proceedings once and for all and in no way jeopardizes a defendant's standing. *STATE v. CLAYTON*, 251 N. C. 261, 111 S. E. 2d 299.

Concerning Petitioner's contention that he is being denied his right to a speedy trial, the State respectfully contends that the petitioner has no right to compel the State to prosecute. The alleged denial could be used by the petitioner, if the State in the future elects to prosecute, as a shield. However, petitioner should not be allowed to use such a contention as a sword, compelling the State to go to the expense of a trial when obviously the Solicitor feels that "Another go at it would not be worth the time and expense of another effort."

CONCLUSION

The State respectfully contends that the petitioner has not been denied his right to a speedy trial, and therefore, the petition for Writ of Certiorari should be denied.

Respectfully submitted,
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